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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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APR 29 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Assessment and Collection  
of Regulatory Fees for  
Fiscal Year 1996

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MD Docket No. 96-84

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COMMENTS OF COMSAT CORPORATION

Warren Y. Zeger  
COMSAT CORPORATION

Howard D. Polsky  
Robert A. Mansbach  
COMSAT International  
Communications

Richard E. Wiley  
Lawrence W. Secrest, III  
William B. Baker

WILEY, REIN & FIELDING

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## **SUMMARY**

The Commission lacks the authority to amend the existing fee schedule to create a whole new category of fee-paying entities, under the rubric of a "Signatory Fee." The Commission's authority to amend the existing fee schedule is limited to certain well-defined circumstances, none of which authorizes the creation of an entirely new classification that targets COMSAT in its capacity as the United States Signatory to INTELSAT and Inmarsat. Accordingly, the Commission's proposed amendment to the fee schedule is *ultra vires*. Furthermore, the Commission's proposed "Signatory Fee" is not reasonably related to any regulatory benefit conferred on COMSAT by the Commission. Rather, COMSAT's Signatory status was created by an Act of Congress. Under well-established law, therefore, the fee is an unauthorized and unconstitutional tax.

The Commission apparently has also failed to consider the fact that COMSAT already pays substantial application and other regulatory fees, including international bearer circuit fees and INTELSAT and Inmarsat satellite launch fees. These fees already more than cover the Commission's costs associated with COMSAT's common carrier offering of INTELSAT and Inmarsat space segment capacity to U.S. customers. The Commission therefore should not be misled by claims that COMSAT is not paying its "fair share" due to the exemption of INTELSAT and Inmarsat satellites from the space station fee. Indeed, the Commission must not look at individual fees in isolation, but must recognize that COMSAT and other firms pay regulatory fees in many different categories, and that certain U.S. separate international satellite systems do not pay all of the fees that COMSAT currently pays.

Finally, the international bearer circuit fee is grossly excessive and must be recalculated, as it apparently would recoup nearly double the appropriate revenue requirement.

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**COMMENTS OF COMSAT CORPORATION**

COMSAT Corporation ("COMSAT"), through its COMSAT International Communications division, hereby submits its Comments in response to the Federal Communications Commission's April 9, 1996 Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding. COMSAT wishes to comment specifically on the Commission's proposal to amend the existing regulatory fee schedule by adding a new "Signatory Fee" category.<sup>1</sup> The Commission's proposal would subject COMSAT, the statutorily designated United States Signatory to INTELSAT and Inmarsat -- and thus the sole entity at whom this fee is targeted -- to a total annual regulatory fee of \$434,150.

As demonstrated below, the proposed "Signatory Fee" category exceeds the Commission's statutory authority. Furthermore, this proposed fee, and other related fees already paid by COMSAT, are grossly in excess of the amount necessary for the Commission to recover its regulatory costs.

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<sup>1</sup> The *NPRM* specifically invited comments on the "Signatory Fee" proposal. See *NRPM*, ¶ 46.

At the outset, COMSAT wishes to state clearly that it does not seek to be exempt from paying regulatory fees to the extent that such charges are legal and justifiable. Indeed, the Commission should recognize that, while COMSAT does not pay space station fees for INTELSAT and Inmarsat satellites, in 1995, it paid more than \$200,000 in international bearer circuit fees, and approximately \$620,000 for all fees.<sup>2</sup> However, COMSAT does object to paying fees that the Commission lacks the legal authority to create. Moreover, the Commission must consider the regulatory fee schedule in its entirety, and should not be misled by claims that COMSAT avoids paying "its share" due to the exemption of INTELSAT and Inmarsat satellites from the space station fee. Although some of COMSAT's competitors may cite "equity" as a basis for targeting COMSAT with a new fee without considering the entire framework, the Commission should be mindful that, in many cases, these entities do not pay all of the fees that COMSAT does.

For example, separate international satellite systems -- such as PanAmSat and Orion -- apparently do not pay circuit fees, although they must pay for space station fees. COMSAT's oceanic cable competitors are required to pay bearer circuit fees, but of course, do not pay the space station fees. COMSAT, in contrast, would be expected to pay *both* bearer circuit fees *and* a new "Signatory Fee," as well as other fees -- for a total amount in excess of \$1,000,000 in regulatory fees *alone* -- a combination that none of its competitors would be paying.

COMSAT pays more than an appropriate share of regulatory fees, and has no objection to paying fees that are devised in a manner consistent with the statutory scheme

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<sup>2</sup> These include regulatory fees for its domestic satellites licensed to COMSAT General Corporation, and for a number of satellite earth stations licensed to COMSAT subsidiaries.

enacted by Congress. COMSAT does object, however, to being assessed a targeted tax which the Commission lacks the statutory authority to adopt, which is unrelated to any regulatory benefits conferred by the Commission, and which would double-recover substantial costs.

### **Background**

Congress enacted the Communications Satellite Act of 1962<sup>3</sup> ("the Act") to facilitate implementation of a 1961 United Nations resolution calling for international cooperation in the development of a global communications system.<sup>4</sup> The Act authorized the creation of a private corporation, COMSAT, and designated it as the United States Signatory to the International Telecommunications Satellite Organization ("INTELSAT").<sup>5</sup> Subsequent legislation also designated COMSAT as the United States Signatory to the International Maritime Satellite Organization ("Inmarsat").<sup>6</sup>

In performing its Signatory functions on behalf of the United States, COMSAT is subject to extensive supervision by the Executive Branch "to assure that [COMSAT's relations with foreign governments and international organizations] shall be consistent with the national interest and foreign policy of the United States."<sup>7</sup>

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<sup>3</sup> See 47 U.S.C. §§ 701 *et seq.*

<sup>4</sup> See G.A. Res. 1721, 1 U.N. GAOR Supp. (No. 17) at 6, U.N. Doc. A/5100 (1962).

<sup>5</sup> See 47 U.S.C. § 731.

<sup>6</sup> The legislation is the International Maritime Satellite Telecommunications Act, codified at 47 U.S.C. § 752(a)(1).

<sup>7</sup> See 47 U.S.C. § 721(a)(4). Executive Order No. 12,046 declares that "[w]ith  
(continued...)

In addition to its quasi-political function as the United States Signatory to INTELSAT and Inmarsat, COMSAT provides a range of satellite-based telecommunications services using the INTELSAT and Inmarsat satellite systems. Specifically, COMSAT provides space segment capacity to its customers using INTELSAT and Inmarsat satellites, subject to common carrier regulations under Title II of the Communications Act of 1934.

In August of 1993, as part of the Omnibus Budget Reconciliation Act of 1993 ("1993 OBRA"), Congress added a new section 9 to Title I of the Communications Act to authorize the Commission to collect regulatory fees.<sup>8</sup> Section 9 vests the Commission with the authority to assess and collect annual regulatory fees "to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services and international activities."<sup>9</sup>

Pursuant to this authority, the Commission adopted rules and a fee schedule to allow it to recover its regulatory costs for Fiscal Year 1994 ("FY 1994").<sup>10</sup> In 1995, the Commission modified the fee schedule to increase, by approximately 93 percent over FY 1994, the revenue generated by these regulatory fees in accordance with a Congressional mandate for Fiscal Year 1995 ("FY 1995").<sup>11</sup> In the current *NPRM*, the Commission again

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<sup>7</sup>(...continued)  
respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies." 43 Fed. Reg. 13,349, 13,354 (1978).

<sup>8</sup> See 47 U.S.C. § 159.

<sup>9</sup> *NPRM*, ¶ 5 (citing 47 U.S.C. § 159(a)).

<sup>10</sup> See 9 FCC Rcd 5333 (1994) ("*1994 Fee Order*").

<sup>11</sup> See 10 FCC Rcd 13512 (1995) ("*1995 Fee Order*").



invokes its § 9 authority to revise the schedule to collect fees that Congress has required for Fiscal Year 1996 ("FY 1996").<sup>12</sup>

As of the date of the *NPRM*, the total fee that the Commission was required by Congress to collect for FY 1996 was identical to the amount required for FY 1995.<sup>13</sup> Accordingly, the Commission's fee proposal for FY 1996 does not change the United States government's bottom line; it does, however, contemplate redistributing the responsibility for these fees as compared to its FY 1995 allocation. In particular, the Commission proposes to amend the fee schedule to create an entirely new category of fee-paying entities. This proposed "Signatory Fee" category is targeted exclusively at COMSAT, the sole United States Signatory to both INTELSAT and Inmarsat.

This newly proposed and substantial regulatory fee on COMSAT based on its Signatory functions would be in addition to the substantial regulatory fees that COMSAT currently pays on international bearer circuits provided by INTELSAT and Inmarsat space stations in its status as a common carrier, not to mention the regulatory fees already paid by COMSAT for earth station and domestic satellite authorizations. As noted, COMSAT also pays very large application fees in connection with the launch of INTELSAT and Inmarsat satellites. COMSAT believes it should, and does, pay its fair and equitable share of fees. The Commission's present proposal, however, would unfairly burden COMSAT -- and only COMSAT -- by requiring it to pay a sizeable annual fee that is unrelated to any regulatory

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<sup>12</sup> *NPRM*, ¶ 1.

<sup>13</sup> Since the issuance of the *NPRM*, Congress enacted the Balanced Budget Downpayment Act II of 1996, which increased the total fee that the Commission was required to collect for FY 1996 from \$116,400,000 to \$126,400,000. See Pub. L. No. 104-134, 110 Stat. 1321.

benefit that COMSAT obtains from the Commission in its capacity as Signatory to INTELSAT and Inmarsat.<sup>14</sup> Moreover, the proposed fee would constitute an improper tax on the INTELSAT and Inmarsat space stations, as well as an improper double recovery for costs for which COMSAT already pays substantial regulatory and application fees.

**I. GIVEN THE ABSENCE OF ANY RELEVANT CHANGE IN CIRCUMSTANCES OR LAW, THE COMMISSION LACKS STATUTORY AUTHORITY TO AMEND THE EXISTING FEE SCHEDULE TO ESTABLISH "SIGNATORIES" TO INTERNATIONAL AGREEMENTS AS A NEW CATEGORY**

The Commission lacks statutory authority to amend the fee schedule by creating a new "Signatory Fee" category under these circumstances. The Commission's sole source of amendment authority permits it to amend the existing fee schedule *only* when there has been a change in the services rendered by the Commission as a consequence of "Commission rulemaking proceedings or changes in law." Neither of these preconditions is applicable to this proposal and, therefore, it is *ultra vires*.

**A. The Commission Lacks the Authority to Amend the Fee Schedule to Create a Whole New Category of Fee-Paying Entities.**

"[I]t is beyond cavil that 'an agency's power is no greater than that delegated to it by Congress.'" *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (*en banc*) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)), *cert. denied*, 115 S. Ct. 1392 (1995); accord *Transohio Savings Bank v. Director, OTS*, 967 F.2d 598, 621

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<sup>14</sup> Indeed, it is COMSAT's carrier and broadcast customers who benefit from the representational role that COMSAT is charged by the Satellite Act to fulfill, and most regulatory costs not already paid for by COMSAT can be traced to its competitors' (unsuccessful) challenges to COMSAT's tariff and facilities applications.

(D.C. Cir. 1992) ("[A] federal agency does not have the power to act unless Congress, by statute, has empowered it to do so."). Although Congress has delegated some amendment authority to the Commission, that statute does not authorize the creation of a whole new category of fee-paying entities in the absence of a change in the nature of the Commission's services, attributable to a rulemaking proceeding or other change in the law.

The Commission's sole source of authority to amend the fee schedule provides, in relevant part, that:

[i]n making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.<sup>15</sup>

Thus, a condition precedent to the Commission's invocation of its § 9(a)(3) amendment authority to reclassify services in the schedule is a change in circumstances or a shift in the law that justifies reclassification. Neither of these circumstances exists here, and as a result, the Commission's proposal to create a whole new "Signatory Fee" category is simply not embraced by the plain language of § 9(a)(3).<sup>16</sup>

Since its creation in 1962, COMSAT has performed the same functions on behalf of the United States in its capacity as Signatory to INTELSAT and, when later established, Inmarsat. For example, under INTELSAT's governing structure, COMSAT serves as the

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<sup>15</sup> 47 U.S.C. § 159(a)(3). Section 9(a)(3) also contains a clause that limits judicial review of certain amendments made pursuant to this section. But as discussed *infra*, Section V, the judicial non-reviewability clause is inapplicable in this case.

<sup>16</sup> The Commission's revision of the fee schedule last year to reflect the reorganization that created the International Bureau is a good example of a change Congress authorized it to make. See *1995 Fee Order*, ¶¶ 81-82.

United States representative to the Board of Governors.<sup>17</sup> In that capacity, COMSAT, acting under the State Department's supervision, attends regular Board meetings and votes on behalf of the United States on pending matters such as procuring satellites and launch vehicles (many of which are manufactured by United States companies), insuring sufficient satellite capacity for United States carriers and broadcasters, and supporting separate system coordinations for U.S.-licensed satellite operators. None of COMSAT's Signatory functions has changed since the formation of INTELSAT's governing structure, let alone since passage of the 1993 OBRA or even over the past year.

Similarly, Congress has not altered the Commission's oversight responsibility with respect to COMSAT and its Signatory functions. Because the nature and character of the Commission's oversight "services" of COMSAT have not changed since 1993 (the date when the present statutory classification system was put into effect), the Commission's reliance on § 9(a)(3) is misplaced.

Congress carefully delineated when, and under what circumstances, the Commission would be empowered to amend the fee schedule. The Commission's § 9(a)(3) amendment authority is limited, and does not authorize this proposal in the absence of a change in the Commission's oversight "services" or the nature of COMSAT's functions. *See Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295, 1298 (5th Cir. 1993) ("[A]n affirmative grant of a specific power includes a denial of powers not granted"); *Transohio*, 967 F.2d at

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<sup>17</sup> INTELSAT's governing arrangement consists of a three-tiered organizational structure, comprising the Assembly of Parties, the Meeting of Signatories, and the Board of Governors. Each member-nation has a seat on the Assembly of Parties, and each member-nation's designated Signatory represents that nation in the Meeting of Signatories and the Board of Governors. *See generally Alpha Lyracom Space Comm., Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 170 (2d Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992).

621 ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them"). Therefore, the Commission's proposal to create a whole new category of fee-paying entities is *ultra vires* and should be rejected.

**B. The Commission May Not Accomplish Indirectly  
What Congress Has Forbidden It To Do Directly**

It is clear for another reason as well that the Commission lacks statutory authority to impose a regulatory fee on COMSAT in its capacity as the United States Signatory to INTELSAT and Inmarsat. As the Commission itself acknowledges in the *NPRM*, Congress expressly excepted COMSAT from paying a geosynchronous satellite regulatory fee for FY 1995.<sup>18</sup> To quote the Commission, "the legislative history of Section 9 states that regulatory fees should not be assessed upon space stations operated by international bodies."<sup>19</sup>

Despite this explicit recognition that Congress did not intend to impose regulatory fees on space stations owned by international organizations, the Commission is now "explor[ing] other ways to recover [its] regulatory cost incurred due to Comsat's participation in the INTELSAT and Inmarsat programs" because of the Commission's "unique regulatory role with respect to these entities."<sup>20</sup>

Creating a new category of fee-paying entities would improperly circumvent a direct statutory limitation on the Commission's authority. This is evident from the fact that the proposed "Signatory Fee" has been calculated as a percentage of the "costs attributable to

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<sup>18</sup> See *FY 1995 Fee Order*, ¶ 110.

<sup>19</sup> *Id.* (citing *1995 Fee Order*).

<sup>20</sup> *NPRM*, ¶ 43.

space station regulatory oversight,"<sup>21</sup> the same cost category for which space station regulatory fees recover costs.

Although the Commission has recognized that, as a matter of congressional intent, it is not authorized to assess fees on INTELSAT and Inmarsat satellites, the proposed "Signatory Fee" is in fact a fee on those satellites, disguised under another name.<sup>22</sup> The Commission should reject the temptation to accomplish indirectly what it cannot accomplish directly.<sup>23</sup>

**II. THE PROPOSED FEE IS UNCONSTITUTIONAL AND UNAUTHORIZED BECAUSE IT BEARS NO RELATIONSHIP TO ANY REGULATORY BENEFIT CONFERRED BY THE COMMISSION ON COMSAT AS SIGNATORY**

The Commission's "Signatory Fee" proposal, which is based solely on COMSAT's status as the United States Signatory to INTELSAT and Inmarsat, is also impermissible because it bears no relation to any specific regulatory benefit that COMSAT has obtained from the Commission by virtue of its Signatory status. Therefore, the proposed fee would be prohibited by both the applicable statute and the United States Constitution.

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<sup>21</sup> *NPRM*, ¶ 46.

<sup>22</sup> "It should be clear that an agency is not free to add extra licensing procedures and then charge a user fee merely because the agency has general authority to regulate in a particular area." *Seafarers International Union of North America v. United States Coast Guard*, No. 95-5016, 1996 WL 168904, at \*3 (D.C. Cir. Apr. 12, 1996).

<sup>23</sup> *See, e.g., Beverly Hospital v. Bowen*, 872 F.2d 483, 486 (D.C. Cir. 1989) (*per curiam*) ("[T]he court . . . must make certain that the agency does not accomplish by indirection what the . . . decree holds the agency cannot do directly").

It is well-settled that, under our Constitution, "Congress . . . is the sole organ for levying taxes."<sup>24</sup> Although Congress may not delegate the power to levy a tax, it may delegate to an administrative agency the power to "exact a fee for a grant which, presumably, bestows a benefit on the applicant not shared by other members of society."<sup>25</sup> Thus, the critical distinction between a "tax" and a "fee" is that a "tax" is simply a general "revenue measure," while a "fee" is "a payment for a special privilege or service rendered."<sup>26</sup> Congress has embodied this constitutional principle in § 159(a)(1) by empowering the Commission to assess and collect regulatory "fees" only.

Before the Commission may assess and collect a regulatory fee, it must demonstrate that the fee charged is a "reasonable approximation" of the costs it incurs in conferring a "specific benefit" on an "identifiable beneficiary."<sup>27</sup> If the Commission cannot demonstrate that the proposed fee bears this reasonable relationship to the benefit conferred, then the proposed fee "will be held invalid" on the ground that it is an unauthorized, and unconstitutional, tax.<sup>28</sup> To insure the existence of a "reasonable approximation" between

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<sup>24</sup> See *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974) (interpreting Article I, Section 8, Clause 1 of the Constitution).

<sup>25</sup> *Id.*

<sup>26</sup> See *National Cable Television Ass'n v. United States*, 554 F.2d 1094, 1106 (D.C. Cir. 1976) ("*NCTA*") ("A 'fee' is a payment for a special privilege or service rendered, and not a revenue measure").

<sup>27</sup> See *NCTA*, 554 F.2d at 1106 ("If a fee is calculated in a proper manner, it should be a reasonable approximation of the attributable costs which the Commission identifies as being expended to benefit the recipient."); accord *Engine Manufacturers Ass'n v. Environmental Protection Agency*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) ("[A]n agency may impose a fee only for a service that confers a specific benefit upon an identifiable beneficiary").

<sup>28</sup> *NCTA*, 554 F.2d at 1106; accord *Central & Southern Motor Freight Tariff Ass'n, Inc.*  
(continued...)

the proposed regulatory fee and the putative regulatory benefit, "the [agency] must justify the assessment of a fee by a clear statement of the particular service or benefit which it is expected to reimburse."<sup>29</sup>

In this case, the Commission's proposed "Signatory Fee" does not satisfy the requirements for a permissible fee. The proposed fee is not a "reasonable approximation" of the Commission's costs of conferring a "specific benefit" on COMSAT because the "benefit" relied on by the Commission -- COMSAT's Signatory status -- is a statutorily created "benefit" conferred by Congress, not the Commission. The remuneration sought fails to constitute a permissible "fee" because the "grant" bestowed on COMSAT was not the result of any "service" performed by the Commission.<sup>30</sup>

The Commission's proposal also fails to recognize that the great bulk of costs attributable to its oversight of COMSAT in its Signatory status are unrelated to any "special benefit" COMSAT derives by voting and participating as the United States Signatory to

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<sup>28</sup>(...continued)

*v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985) ("[where] such fees or assessments went beyond the recovery of costs for benefits conferred upon identifiable beneficiaries, [those] charges . . . were more conceptually akin to taxes, which could, of course be levied only by Congress") (citing cases); *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (when "fees do not besto[w] a benefit on the [regulated party], not shared by other members of society, they might be better thought of as taxes rather than fees").

<sup>29</sup> *Electronic Indus. Ass'n v. Federal Communications Comm'n*, 554 F.2d 1109, 1117 (D.C. Cir. 1976).

<sup>30</sup> Similarly, even if COMSAT's exclusive access to the INTELSAT and Inmarsat space segments is a "benefit" that is inextricably intertwined with its Signatory status, this "benefit" -- like COMSAT's Signatory status -- was conferred by Congress, not the Commission. The Commission simply does not have the authority to collect a fee when it has not conferred the "benefit" on which the fee is purportedly based.



INTELSAT and Inmarsat.<sup>31</sup> When COMSAT acts in its quasi-political capacity as the United States Signatory to INTELSAT and Inmarsat, it is merely carrying out duties and obligations that Congress and the Executive Branch have imposed upon it. Those duties require COMSAT to implement United States foreign policy in the realm of international and global satellite communications. COMSAT thus derives no "special benefit" from its quasi-political functions that would support imposition of a regulatory fee.

Finally, the Commission's reference to the "resource burden" that stems from its "oversight" of COMSAT as Signatory does not establish the validity of the proposed fee.<sup>32</sup> In order for the proposed "Signatory Fee" to be a permissible regulatory fee, the Commission must demonstrate that the proposed fee is a "reasonable approximation" of costs it incurred in granting a "special benefit" to COMSAT in its capacity as Signatory. The *NPRM* fails to demonstrate any correlation between the costs of regulating COMSAT and the size of the "Signatory Fee."<sup>33</sup> Moreover, the *NPRM* fails to demonstrate that, in fulfilling its Signatory obligations, COMSAT derived *any* particular economic benefit from the

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<sup>31</sup> The focus here is on whether COMSAT derives any "benefit" from its status *as Signatory*, and not as common carrier. The distinction between COMSAT's Signatory and common carrier functions is important and has legal significance. See *Alpha Lyracom*, 946 F.2d at 174 (holding that the distinction between COMSAT's Signatory and common carrier functions was dispositive for purposes of determining COMSAT's immunity from suit), *aff'd in relevant part*, *Alpha Lyracom Space Comm., Inc. v. Communications Satellite Corp.*, No. 89 CIV 5021 (JFK), 1990 WL 135637, at \*8 (S.D.N.Y. Sept. 13, 1990) (same).

COMSAT does, of course, derive certain returns from its investment in INTELSAT, but the costs of regulating this commercial activity are insignificant in comparison to the Commission's costs in overseeing COMSAT in its quasi-political capacity.

<sup>32</sup> *NPRM*, ¶ 43.

<sup>33</sup> Indeed, the Commission has not shown that *any* of its fees bears a reasonable approximation to the costs the agency incurs.

Commission. In fact, any benefits conferred on account of COMSAT's Signatory status are attributable to Congress, not the Commission. The Commission cannot bootstrap the fact that it incurs costs into an assertion that *it* confers the "benefit." Therefore, the Commission's proposal, if adopted, would amount to an unauthorized and unconstitutional tax.

**III. THE PROPOSED SIGNATORY FEE, EVEN IF LAWFUL, APPEARS IMPROPERLY TO REQUIRE COMSAT TO MAKE DOUBLE PAYMENTS, AND SHOULD BE REDUCED**

Even assuming, *arguendo*, that the Commission has the legal authority to levy a tax upon COMSAT, under the guise of a "Signatory Fee," the proposed fees -- in the amount of \$217,075 per Signatory for one year alone, for an annual (for 1996 only) fee total of \$434,150 -- are grossly excessive. At a minimum, the amount assessed COMSAT in "Signatory Fees" must be reduced (1) to the extent that the proposed fee is based on application processing costs; (2) to the extent it would recover costs already paid by COMSAT in international bearer circuit fees; and (3) by the costs associated with the instructional and oversight functions.

The *NPRM* lists the following activity "costs" which allegedly are "directly attributable" to the Commission's Signatory oversight functions. The matters cited in justification of the fee include:

- (1) COMSAT's "authority to provide services via Intelsat and Inmarsat";
- (2) COMSAT's "authority to participate in the procurement or leasing of various Intelsat and Inmarsat space and stations;"
- (3) COMSAT's authority "to participate in certain Intelsat and Inmarsat-associated businesses;"

- (4) COMSAT's compliance with applicable structural and financial separation rules;
- (5) Participation in Executive Branch instructional process and other oversight of Signatory activities and Assembly of Parties meeting; and
- (6) Maintenance "of public files of Intelsat and Inmarsat governing board and other organization documents."<sup>34</sup>

These costs, the only ones cited in the *NPRM*, do not begin to justify the \$434,150 annual fee on COMSAT now being proposed. Items (1) and (2) are already recovered through separate application fees; items (5) and (6) concern Signatory functions and may not be assessed on COMSAT for the reasons stated in the preceding section; and the costs associated with items (3)<sup>35</sup> and (4) are covered by other fees which COMSAT currently pays to the Commission.

First, the costs identified in categories (1) and (2) are already fully recovered through application fees, and in any event may not be recovered through regulatory fees. Regulatory fees under Section 9 are limited to recovering costs incurred in several specific regulatory functions: "enforcement activities, policy and rulemaking activities, user information services, and international activities."<sup>36</sup> Costs associated with the processing and review of applications are recovered through a separate set of application fees levied pursuant to Section 8.<sup>37</sup>

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<sup>34</sup> *NPRM*, ¶ 44.

<sup>35</sup> It is not clear to COMSAT what category (3) encompasses. Certainly, it would be improper to recover through a regulatory fee costs already recovered through an application fee.

<sup>36</sup> 47 U.S.C. § 159(a).

<sup>37</sup> *See* 47 U.S.C. § 158.

In particular, COMSAT already pays fees for Section 214 authorizations to provide services via INTELSAT and Inmarsat, and for authority to participate in INTELSAT and Inmarsat procurements. In addition, COMSAT also pays a fee of \$80,360 for *each* launch of an INTELSAT or Inmarsat satellite, even though COMSAT's stake in the INTELSAT and Inmarsat systems ranges from about 19 to 25 percent, and even though \$80,000 is clearly far in excess of the amount it costs the Commission to process *any* launch application.<sup>38</sup> These fees fully recover (in all likelihood, many times over) the costs associated with the functions described in categories (1) and (2) above. The Commission may not double-recover these costs -- fully paid in application fees -- through a new regulatory fee. To the extent the proposed "Signatory Fee" includes costs associated with the functions described in (1) and (2) above, the fees must be reduced by the amount of those costs.

Second, categories (5) (participation in Executive Branch consultations) and (6) (maintenance of public files) comprise the Commission's oversight costs incurred in connection with the INTELSAT and Inmarsat governing bodies and the instructional process. For the reasons discussed in Section II, the Signatories (COMSAT in each instance) receive no regulatory benefit from such activities. Accordingly, the Commission must reduce the purported fee by the amount of these costs.

Third, the *NPRM* does not recognize that COMSAT already makes a substantial fee payment which should offset some of the costs allegedly chargeable to the Signatories. For this reason, imposition of the new tax would be most inequitable and would place COMSAT at a significant competitive disadvantage vis-a-vis other satellite providers. In this regard, it

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<sup>38</sup> The typical COMSAT launch order is, at most, two pages long and merely recites, almost verbatim, the information contained in COMSAT's application.

is worth noting that, as the next section demonstrates, the Commission recovered over \$400,000 more in bearer circuit fees last year than it had projected.<sup>39</sup> Thus, in effect, the international bearer circuit fees that COMSAT pays are cross-subsidizing other regulatory costs.

In particular, COMSAT paid, in 1995 alone, more than \$200,000 in international bearer circuit fees covering some 50,000 circuits, which its principal separate satellite competitors apparently do not pay. COMSAT paid approximately \$100,000 in such fees in 1994.<sup>40</sup> The fact that COMSAT has not challenged whether it must pay this fee, although there are legitimate legal grounds for doing so,<sup>41</sup> demonstrates COMSAT's willingness to

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<sup>39</sup> Indeed, COMSAT's payment of fees for some 50,000 international bearer circuits in 1995 could partly explain why the Commission in 1995 collected more than \$400,000 in fees for bearer circuit units *above* the amount forecast.

<sup>40</sup> COMSAT also pays regulatory fees incurred for its domestic satellite and earth stations, which surely greatly exceed the actual costs incurred in regulatory activities conducted for COMSAT's benefit.

<sup>41</sup> First, these fees constitute an indirect tax on the INTELSAT and Inmarsat space stations, which are exempt from the regulatory fee program as a matter of law. *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13,512, 13,591 (June 19, 1995); see also H.R. Rep. No. 297, 102d Cong., 1st Sess. 26 (1991) (incorporated by reference in the Omnibus Budget Reconciliation Act of 1993, which established the regulatory fee program. Conference Report H. Rep. No. 213, 103d Cong., 1st Sess. 499 (1993)).

Second, the bearer circuit fee currently is assessed on the facilities-based common carrier that activates a circuit. The Commission recently amended its rules to define a U.S. international facilities-based carrier as an entity that holds an "ownership, indefeasible-right-of-user, or leasehold interest in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable, or an INTELSAT or separate satellite system." *Market Entry and Regulation of Foreign-affiliated Entities*, FCC 95-475 at ¶ 130 (released Nov. 30, 1995). In addition, the international bearer circuit fee should be assessed only on a facilities-based common carrier that activates the circuit for the provision of service to an end user or resale carrier (*1995 Fee Order*, ¶ 41). COMSAT's relationship to INTELSAT and Inmarsat, however, fits none of these categories. Rather, COMSAT's

(continued...)

contribute to the recovery of regulatory costs. However, COMSAT does object either to paying for costs that are not properly regulatory costs, or to paying for such costs twice.

Nowhere in the *NPRM* does the Commission appear to have considered the extent to which the Signatory Fee would recover costs that Section 9 fees may not recover, or the extent to which imposition of such a Fee would double-recover costs from COMSAT. Even assuming that the Commission had the legal authority to create a new "Signatory" fee, the proposed fees would improperly recover substantial costs already recovered through application fees or through other regulatory fees that COMSAT currently pays.

#### **IV. THE INTERNATIONAL BEARER CIRCUIT FEE IS GROSSLY EXCESSIVE AND MUST BE REDUCED SIGNIFICANTLY**

The proposed fee for international bearer circuits appears to be approximately twice the appropriate fee. It therefore should be reduced.<sup>42</sup>

First, the revenue requirement associated with international bearer circuits has increased by more than 80 percent in one year without *any* explanation. The 1995 international bearer circuits fee was intended to recover a "revenue requirement" of

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<sup>41</sup>(...continued)

function is to make capacity available to U.S. carriers, which themselves are the "facilities-based carriers" -- not "end users" or "resale carriers" -- under the revised definition.

<sup>42</sup> The Commission should be especially careful in assessing regulatory fees before its accounting system becomes reliable. *See NPRM*, ¶ 15-17. The Commission severely underestimated the actual number of international bearer fee units in 1995, and to the extent that the Commission over-recovered in international bearer circuit fees last year, an offset would be appropriate. Absent any new data, it has no basis for presuming that the number of fee units will be any different in 1996 and, due to the deficiencies found in the accounting system to date, the Commission has no new basis for calculating costs.

\$500,000.<sup>43</sup> The corresponding proposed revenue requirement for FY 1996 is \$912,000 -- an increase of \$412,000. It is passing strange that the *NPRM* does not even note this vast increase. Nor does it even offer any explanation as to why the revenue requirement associated with international bearer circuits in 1996 is so much greater than in 1995. On the contrary, there is ample reason to think that the revenue requirement should continue to be \$500,000. In particular, the Commission states that "the amount Congress requires that we recover for FY 1996 is the same amount as we were required to recover for 1995."<sup>44</sup> There is not a word in the *NPRM* that suggests that regulatory costs of "enforcement activities, policy and rulemaking activities, user information services, and international activities"<sup>45</sup> associated with international bearer circuits have increased 80 percent in one year.

Indeed, upon examination, it appears that the Commission severely underestimated international bearer circuit payment units in 1995, and has simply used the much higher actual total in developing its 1996 forecast without adjusting the fee to meet the \$500,000 revenue requirement. In 1995, the Commission forecast the number of international bearer circuits as 125,000 units, resulting in a charge of \$4.00 per unit.<sup>46</sup> *Actual* payment units in 1995, however, apparently greatly exceeded 125,000. The basis for the estimate of 1996

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<sup>43</sup> 1995 Fee Order, ¶ 115.

<sup>44</sup> *NPRM*, ¶ 2.

<sup>45</sup> 47 U.S.C. § 159(a).

<sup>46</sup> *Id.* \$500,000 divided by 125,000 units produces the unit fee of \$4.

international bearer circuit payment units is "actual FY 1995 payment units."<sup>47</sup> The forecast for 1996 payment units is 228,000.<sup>48</sup>

Thus it appears that the increase in the revenue requirement for bearer circuits -- amounting to \$412,000 more than in FY 1995 -- is entirely unrelated to any actual increase in costs, but arises from the underforecast of payment units in 1995, and the use of 1995 actual payment units as the basis for the 1996 forecast. Since there is no evidence that the costs which the fee is to recover have increased, the *NPRM*'s proposed retention of the \$4.00 per circuit fee -- which was based on a much lower forecast of payment units which proved incorrect -- is entirely unjustified. For this reason alone, the fee should be reduced by 80 percent, to \$0.80.

Second, the Commission appears to have ignored the effect of a recent change in its regulatory policies that may further affect the number of payment units. As a result of its decision in the *DISCO-I Order* eliminating the previous distinction between domestic and international satellites,<sup>49</sup> there should be an increase in the number of international bearer circuits as domsats offer more international services. The *NPRM* does not appear to have considered the effect of this policy change on the likely number of payment units. This necessary adjustment should reduce the fee still further.

Third, the Commission should make clear that international bearer circuits are to be paid by *all* facilities-based satellite operators that activate circuits, not merely satellite

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<sup>47</sup> *NPRM*, Appendix B.

<sup>48</sup> *NPRM*, Appendix C. At a fee of \$4.00 per circuit, these figures suggest that actual 1995 revenues exceeded \$900,000.

<sup>49</sup> FCC 96-14 (released Jan. 22, 1996), *summary published* 61 *Fed. Reg.* 9946 (Mar. 12, 1996) ("*DISCO-I Order*").



"common carriers." This change is necessary to ensure that all satellite operators who provide international bearer circuits contribute to payment of the regulatory costs. Without this clarification, satellite operators that are not classified as "common carriers" -- including PanAmSat and Orion -- may believe that they are exempt from bearer circuit fees.<sup>50</sup> The apparent loophole is not required by the statute and should be rectified, especially in view of the Commission's redefinition of a facilities-based carrier in its Report and Order in the *Market Entry and Regulation of Foreign-affiliated Systems* proceeding quoted above.

There is no statutory justification for not expressly applying the international bearer circuit fee to "non-common carrier" satellite systems. The 1993 OBRA established the fee for "international bearer circuits" without limiting its applicability to common carriers. The "common carrier" language was an unexplained gloss introduced by the Commission in the 1994 Fee Order, and has no basis in the statute.<sup>51</sup> Requiring non-common carrier firms to pay is also supported by the fact that a fee is applied to the sale of IRUs in oceanic cables, a non-common carrier offering.

In addition, the guidelines state that the fee "is to be paid by the facilities-based common carrier activating the circuit in any transmission facility for the provision of service

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<sup>50</sup> COMSAT has reason to believe that at least one of these satellite companies may not pay international bearer circuit fees. If they do, however, they should have no objection to COMSAT's recommended change. These firms, of course, derive substantial competitive benefits from using this agency's regulatory processes to challenge on a regular basis COMSAT's ability to compete with them.

<sup>51</sup> See 1994 Fee Order, 1995 Fee Order, ¶ 115. Unlike the space station fee, the bearer circuit fee was not contained in the 1991 version of regulatory fee legislation. That fee appeared for the first time in the 1993 OBRA, but is not discussed in the Committee Report. The "common carrier" language appears to be nothing more than an unnecessary gloss created in the implementation order.